CO-OPERATIVE CENTRAL BANK BHD.

v.

BELAKA SURIA SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-31-3853-87]
10 MAY 1990

UNINCORPORATED ASSOCIATIONS: *Locus standi of co-operative society to sue - Whether its registration violated the Banking Act 1973 - Whether can give loans to borrowers in the form of overdraft facility - Whether can secure loan by charge on land - Real intention of legislature - Banking Act 1973, ss. 2, 3(1), 9, 59 - Co-operative Societies Ordinance 1948, ss. 7, 30 - Moneylenders Ordinance 1951, s. 2A(1).*

LAND LAW: *Right of chargee to pursue two actions - Present civil suit for order for sale - Earlier action for recovery of debt - Pending appeal to Supreme Court - Whether same issues - Whether cause to the contrary - Lesco case - Whether binding - National Land Code s. 256(2), (3) - Rules of the High Court 1980, O. 83.*

CIVIL PROCEDURE: *Right of chargee to pursue two actions - Present civil suit for order for sale - Earlier action for recovery of debt - Pending appeal to Supreme Court - Whether same issues - Whether cause to the contrary - Lesco case - Whether binding - National Land Code, s. 256(2), (3) - Rules of the Highh Court 1980, O. 83*

By an originating summons dated 28 December 1987, the plaintiff CCB applied to the Civil Division of the High Court, Kuala Lumpur under s. 256(2) of National Land Code for an order of sale by public auction of property registered in the name of defendant D but charged to the plaintiff (the present action). The charge over the said property was to secure the repayment of the loan amounting to RM3.5 million granted by the plaintiff to one L (the borrower).

On 27 September 1988 D applied by way of summons in chambers for an order of stay of all related proceedings until the disposal of pending appeal in the Supreme Court in relation to an earlier civil suit in the commercial division of the High Court whereby CCB had sued 5 parties in relation to the said loan granted by CCB to L. Summary judgment had been entered against all 5 defendants and on appeal, this decision was reversed.

The defendant therefore contended that the matter before this Court should be stayed pending the disposal of the appeal by the Supreme Court since the issues raised at the earlier civil suit and the issues in the present action were substantially the same.

The issue for the Court was also whether CCB had violated s. 9 of the Banking Act 1973 (the 1973 Act) and whether it was allowed to grant overdraft facilities by securing a charge over land.

CCB contended that it has a right, as a chargee, so long as any part of the debt remained unpaid, to pursue any or all of its remedies at the same time. CCB also said that it was allowed to carry out banking business for the benefits of its members pursuant to s. 30 of the Co-operative Societies Act 1948 (the 1948 Act) and its by-laws, which had duly been registered with the Registrar of Co-operative Societies.

Held:

[1] Simply because there is a pending action in the commercial division of the Kuala Lumpur High Court where judgment had been made in favour of the defendant and the matter has gone on appeal to the Supreme Court, does not mean that this Court should exercise its inherent jurisdiction to stay the present action.

[2] The issue which the Counsel for the defendant was referring to raises a pure question of law. There is no authority that since the issue had been adjudicated by another Court in an O. 14 proceeding it must follow that this Court has no jurisdictgion to adjudicate on the matter. Counsel for the respondent in the civil suit had not in the argument raised the points which the plaintiff's Counsel had raised in the present action. Neither had the Counsel for the respondent in the civil suit cited any authority in opposing the appeal in that case.

[3] There are two different actions asking for two different remedies. The action instituted by CCB here is not vexatious as it was merely exercising a statutory right conferred on it by the NLC. In the earlier action, the plaintiff was exercising the common law right to recover a debt under a contract. Based on the facts of this case, the *Lesco* case is not binding on this Court.

[4] An examination of the object of the Act and ss. 30(2) and 34(2) shows that CCB is allowed under the 1948 Act to grant loans in the form of overdraft facility as this sort of facility is one of the methods by which CCB can make loans to its members. It is also clear that CCB can accept a charge over any land as security for the loan unless the Minister otherwise prohibits. To construe the provision of the 1948 Act in a restrictive sense would defeat the real intention of the legislature.

[5] The fact that the legislature did not think it necessary to exempt registered co-operative societies from the provisions of the Banking Act pursuant to s. 59 thereof clearly indicates that the limited banking business carried out by these societies does not fall within the provisions of the 1973 Act.

[6] CCB has infringed s. 9 of the 1973 Act by calling itself a bank as it does not carry on banking business with members of the general public; however this infringement does not render the charge agreement a nullity. The plaintiff may be liable to a penalty imposed under s. 9(2) of the 1973 Act but this penalty cannot affect the charge agreement which CCB is allowed to enter into under the 1948 Act.

[Order for sale by public auction granted; Application for stay dismissed; defendant to pay costs of proceedings to plaintiff.]

Cases referred to:

Thames Launches Ltd. v. Trinity House Corp. (Deptford Strond) [1961] 1 Ch 197 ***(dist)***
The Royal Bank of Scotland Ltd. v. Citrusdal Investments Ltd. [1971] 3 All ER 558 ***(cit)***
Lesco Dvpt. Corp. Sdn. Bhd. v. Malaysia Building Society Bhd. [1987] CLJ (Rep) 160 ***(cit)***
Gordon Grant & Co. v. F.L. Boos [1926] AC 781 ***(cons)***
Bank Bumiputra Malaysia Bhd. v. Esah Binti Abdul Ghani [1985] CLJ (Rep) 41 ***(cit)***
Keng Soon Finance v. M.K. Retnam Holdings Sdn. Bhd. & Anor. [1989] 1 CLJ (Rep) 1 ***(cons)***
Ooi Boon Leong & Ors. v. Citibank NA [1984] 1 MLJ 222 ***(cit)***
Shannon Realties v. (Ville de) St. Michel [1924] AC 185 ***(cons)***

Legislation referred to:

Banking Act 1973, ss. 2, 3(1), 9(1), (2), 59
Contracts Act 1950, s. 24
Co-operative Societies Act 1948, ss. 7, 30(1), (3), 34(2)
Moneylenders Ordinance 1951, s. 2A(1)
National Land Code 1965, ss. 256(2)

Pilotage Act 1913, [UK] ss. 11, 43
Rules of High Court 1980, O. 14, O. 83

Other source referred to:
Law of Mortgage Fisher & Lightwood, 1977 Edn. pp 270-271

For the plaintiff - Sivaloganathan; M/s. Siva, Thurai, Mariany & Co.
For the defendant - Christina Chia; M/s. Christina Chia & Partners

[**Editor's Note:** The defendants have appealed to the Supreme Court *vide* Civil Appeal No. 02-142-90.]

JUDGMENT

Lim Beng Choon J:

By this originating summons dated 28 December 1987, the plaintiff applied to this Court for an order for sale by public auction of the land held under Lot 5, Seksyen 87A, Geran 5875 in the town of Kuala Lumpur (the said land) registered in the name of the defendant but charged to the plaintiff under Charge Presentation No. 9590/85 Jilid 388 and Folio 56 which presentation was duly registered by the Pendaftar Tanah Wilayah Persekutuan on 24 June 1985. The application of the plaintiff was made pursuant to s. 256(2) of the National Land Code and it had complied with the procedure for making the application as set out in O. 83 of the Rules of High Court 1980. The charge over the said land was to secure the repayment of the loan amounting to RM3,500,000 granted by the plaintiff to one Laura Hauw Soei Yong (the borrower).

In support of the application of the plaintiff for an order for sale of the said land by public auction, its Assistant General Manager filed an affidavit affirmed by him on 22 December 1987. In that affidavit the said Assistant General Manager explained about the creation and purpose of the charge, the failure on the part of the borrower to make the necessary repayment towards the loan, and the sending of the statutory notice in Form 16D by the plaintiff to the defendant. As the defendant had failed to remedy the breach mentioned in the said notice within the stipulated period the full amount of the loan with the aggregate interest in the sum of RM4,255,076.50 was as at 30 June 1987 due and payable to the plaintiff pursuant to the charge agreement.

On 27 September 1988 the defendant applied to this Court by way of summons in chambers (encl. 9) for an order, under the inherent jurisdiction of the Court, directing that the hearing of this originating summons of the plaintiff and all further proceedings in the present action be stayed until the disposal of the Civil Suit No. D1-23-2919-87 pending in the commercial division of the High Court Kuala Lumpur. From the affidavit in support of the defendant's application to stay affirmed by its former company secretary on 27 September 1988 (encl. 10) and the supplementary affidavit affirmed by its present company secretary on 16 January 1990 (encl. 19) the reasons for the defendant's application for a stay are as follows.

Apparently the plaintiff in the present action instituted the Civil Suit No. D1-23-2919-87 in the commercial division of the High Court Kuala Lumpur (the said civil suit) against five parties as defendants namely the borrower, the three persons who guaranteed the repayment of the said loan granted by the plaintiff to the borrower and the defendant in the present action named as the fifth defendant in the said civil suit. The plaintiff in the said civil suit made an application for summary judgment pursuant to O. 14 of the Rules of High Court 1980. The O. 14 application was heard by the relevant Senior Assistant Registrar of the Court (the SAR) who on 13 June 1988 allowed summary judgment to be entered against all the

defendants in the said civil suit. Thereupon all the defendants in that suit appealed to the Judge. Upon hearing the appeal in chambers the learned Judge found in favour of the five defendants in the said civil suit and reversed the decision of the SAR. The plaintiff thereafter appealed against the decision of the learned Judge to the Supreme Court on 4 January 1990 and the appeal is still pending before the Supreme Court. The defendant therefore contended that the matter before this Court should be stayed pending the disposal of the appeal by the Supreme Court since the issues raised at the O. 14 proceeding in the said civil suit and the issues raised in the present action were substantially the same namely that:

(1) the plaintiff has no *locus standi* to sue as the registration of the plaintiff under the Co-operative Societies Ordinance 1948 is in violation of s. 9 of the Banking Act 1973;

(2) the said loan advanced to the said Laura Hauw Soei Yong is illegal for violation and contravention of the Banking Act 1973 and the Moneylender Ordinance 1951;

(3) the interest charged by the plaintiff is harsh and unconscionable.

In rebutting the first and second issues raised by the defendant the plaintiff through its receiver put in a further affidavit affirmed on 16 January 1990 (encl. 18) in which he averred that the Co-operative Central Bank Limited was a bank registered under s. 7 of the Co-operative Societies Ordinance 2948 and it had its own by-laws and he produced the by-laws which are pertinent to the present action (see Exhibit 'HAK3' annexed to the said further affidavit in encl. 18). It is common place that the said by-laws were duly registered by the Registrar of Co-operatives Societies Federation of Malaya on 29 September 1958.

At the hearing of the case on 26 September 1989 I proposed to the Counsel acting for the respective parties that I would hear the application of the defendant to stay the proceedings as well as the plaintiff's application for an order for the sale of the said land by public auction. As there was no objection by either Counsel I therefore fixed the hearing of both the applications on 19 January 1990. On that date both Counsel agreed to a postponement to enable further affidavits to be filed. The hearing was therefore postponed to 14 February 1990.

In her submission Counsel for the defendant stressed the fact that the issues in the present action are the same as the three issues referred to in the affidavit affirmed by the former company secretary of the defendant on 27 September 1988 (encl. 10) which issues I have fully set out earlier. The said issues had been decided by the learned Judge in favour of the defendant in CS.23-2919-87. The plaintiff has lodged an appeal to the Supreme Court against the decision of the learned Judge and the matter is now pending in the Supreme Court. In the circumstances Counsel therefore urged me to stay the present proceeding and she cited the following three authorities in support of her contention (1). *Thames Launches Ltd. v. Trinity House Corp. (Deptford Strond)* [1961] 1 Ch 197, *The Royal Bank of Scotland Ltd. v. Citrusdal Investments Ltd.* [1971] 3 All ER 558 and *Lesco Dvpt. Corp. Sdn. Bhd. v. Malaysia Building Society Bhd.* [1987] CLJ (Rep) 160. Counsel then went on to argue that in granting overdraft facilities to the borrower on accepting the charge from the defendant to secure payment of the overdraft facilities the plaintiff was in fact carrying on banking business as defined in s. 2 of the Banking Act 1973. This the plaintiff could not do pursuant to s. 3(1) of the said Act. Furthermore Counsel said that the plaintiff used the word 'bank' to denote the business carried on by it. In doing so the defendant had therefore contravened s. 9(1) of the Banking Act 1973. Counsel also pointed out to me that it was stated in the exemption clause in s. 59 of the said Act that "The provision of this Act shall not apply to" certain corporations and statutory bodies and the plaintiff corporation does not come within the

said exemption. Counsel therefore said that the charge entered between the plaintiff and the defendant was a nullity.

Counsel for the plaintiff, on the other hand, submitted firstly that in dealing with an application for summary judgment pursuant to O. 14 of the RHC the Court was often reluctant to give final judgment and would dismiss the application if the Court held that there was a triable issue. Secondly Counsel said that in CS23-2919-87 the plaintiff's cause of action was for the recovery of a debt owed by the borrower. In the present action the plaintiff is relying on s. 256(2) of the National Land Code to enforce a statutory right. Counsel drew my attention to certain passages in Fisher & Lightwood's *Law of Mortgages* 1977 Edn. to support his contention that it is the right of the chargee, so long as any part of the debt remained unpaid to pursue any or all of his remedies at the same time. On the question of the plaintiff carrying on banking business without a licence, Counsel argued that the plaintiff bank came into existence by virtue of s. 7 of the Co-operative Societies Act 1948. Counsel drew my attention to the Certificate of Registration of the plaintiff bank issued by the Registrar of Co-operative Societies dated 29 September 1958 (see Exhibit "CLC1" annexed to the affidavit of the former Company Secretary of the defendant affirmed on 4 August 1988 in encl. 8). Counsel then went on to argue that s. 3(1) of the Banking Act 1973 was enacted to forbid a corporation to carry on banking business with members of the general public. In the present case the plaintiff is only carrying out banking business for the benefits of its members. This was allowed, so said Counsel, pursuant to s. 30 of the Co-operative Societies Act 1948 and the by-laws 3(p) and 5 of the plaintiff bank which had been duly registered with the Registrar of Co-operative Societies on 29 September 1958. The borrower in the present case is a member of the Co-operative Central Bank Ltd. Counsel also pointed out that although s. 10 had conferred power on the Central Bank to examine the books, accounts and record of any person whom they had reason to suspect or believe that the person was transacting banking business without a licence in contravention of the Banking Act 1973, the Central Bank had not thought it fit to examine the books, accounts and records of the plaintiff bank thereby implying that the plaintiff bank was not acting in contravention of the said Act.

In considering the defendant's application to stay the present action of the plaintiff and all further proceedings arising therefrom, I am not convinced by the suggestions of the defendant that simply because there is a pending action in the commercial division of the Kuala Lumpur High Court where judgment had been made in favour of the defendant and the matter has gone on appeal to the Supreme Court, this Court should exercise its inherent jurisdiction to stay the present action. I say so for these reasons. As stated in Fisher & Lightwood's *Law of Mortgages* 1977 Edn., pp. 270-271 (I need to quote only the part of the commentaries which is relevant):

> As soon as the mortgagor has made default in payment of the mortgage debt ... the mortgagee is entitled to pursue any or all of his remedies against the debtor or his assets or the incumbered estate ... For contrary to the general rule that a person liable to be sued is not to be harassed by a multiplicity of actions, it is the right of the mortgagee, or other secured creditor, so long as any part of the debt remained unpaid to pursue any or all of his remedies at the same time. Hence he may at the same time sue for payment on the covenant to pay the principal and interest, for possession of the mortgaged property and for foreclosure and he can combine these claims in the same action.

Judicial decisions acknowledge the aforesaid commentaries. Thus in *Gordon Grant & Co. v. F.L. Boos* [1926] AC 781 at p. 784 it is said:

> As a general rule the mortgagee is entitled to pursue all the remedies which are given to him

by his contract. He can recover upon the personal covenant of his debtor and he can enforce his charge upon the mortgaged property. But care has to be taken that he is not overpaid.

In the present case apart from its common law right to sue the borrower guarantors and chargor for the recovery of the debt, the plaintiff is also given the statutory right to sell the charged property by order of the Court pursuant to s. 256(2) of the National Land Code which provides:

> Any application for an order for sale under this chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

An illustration of the principle that a chargee can pursue all remedies available to him can be seen in the case of *Bank Bumiputra Malaysia Bhd. v. Esah Binti Abdul Ghani* [1985] CLJ (Rep) 41. In principle therefore a chargee has a right to institute an action for recovery of the debt and also a right to assert the power of sale on the incumbered property, the two actions are not the same. The reason for allowing the chargee to pursue all remedies available to him is stated in the *Gordon Grant & Co.* case (*supra*) in this way at pp. 786-787:

> If the property realizes more than what is due to him, the mortgagor gets the balance. If the property realizes less, the mortgagee is *pro tanto* unpaid and should be allowed to sue on the personal covenant.

It is also to be noted that subsection (3) of s. 256 of the National Land Code provides that:

> On any such application, the Court **shall order** the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary. (Emphasis is mine).

In construing the scope of the said subsection (3) the Privy Council in *Keng Soon Finance v. M.K. Retnam Holdings Sdn. Bhd. & Anor.* [1989] 1 CLJ (Rep) 1 at 4 said:

> Section 256(3) of the National Land Code is mandatory. The Court 'shall' order a sale unless it is satisfied of the existence of 'the cause to the contrary'.

What then is 'the cause to the contrary' that prevents me from granting an order for the sale of the said land in the present case? In this connection Counsel for the defendant said that as the issue raised in CS.23-2919-87 in the commercial division of this Court was the same as the issue appearing in the present action namely that the plaintiff bank could not carry on banking business I must therefore stay the present action particularly when the learned Judge who heard the plaintiff's application for an O. 14 judgment had decided the issue in favour of the defendant and the matter has gone on appeal to the Supreme Court. The short answer to this argument is that an appeal does not amount to a stay and an appellant has to apply to the Court for a stay. In considering the question of a stay the Court will have to consider the circumstances in each particular case. When the plaintiff here brings an action to enforce his security by asking the Court for an order for sale why should his action be stayed when it is not the same as the case in the commercial division of this High Court? There are two separate actions asking for two different remedies. In any event the issue which the Counsel for the defendant was referring to raises a pure question of law namely whether the plaintiff bank can lawfully carry on banking business and if not whether the loan granted to the borrower secured under the charge is lawful. This issue has been fully raised by the defendant in the several affidavits filed in this action. The issue has been fully argued before me by the Counsel acting for the respective parties. It has not been said by anyone that I have no jurisdiction to adjudicate on that issue and I do not think that since the issue has been adjudicated by another Court in an O. 14 proceeding it

must follow that I have no jurisdiction to adjudicate on that matter - see *Ooi Boon Leong & Ors. v. Citibank NA* [1984] 1 MLJ 222. It is true that in the *Lesco* case (*supra*) the Supreme Court has stated that:

> ... it is undesirable to allow a situation where two different Courts would try and determine the same issues between the same parties relating to the same subject matter.

But it appears to me that the Counsel for the respondent in that case had not in the argument raised the points which the plaintiff's Counsel had raised before me. Neither had the Counsel for the respondent in that case cited any authority in opposing the appeal in that case. Had Counsel for the respondent there raised the arguments which the plaintiff's Counsel did in this case supported by authorities the Supreme Court might well have not made the suggestion. For these reasons I am of the view that the *Lesco* case is not binding on me. Now that the defendant in the present case has lodged an appeal against my decision the Supreme Court will have an opportunity to review the observation made by it in the *Lesco* case. It may well be that the Supreme Court will hold that my decision is wrong but that is of no consequence. What is important is that the decision of the Supreme Court in the present appeal will certainly clear the air of any doubt regarding whether a chargee has the right to pursue the two actions as happened in the present case.

I shall now deal with the other two cases cited by Counsel for the defendant. In the first case of *Thames Launches Ltd. v. Trinity House Corp. (Deptford Strond)* it is to be noted that in that case the plaintiff company, Thames Launches Ltd., which owned passenger boats operating on the River Thames, issued an originating summons against the Corporation of Trinity House of Deptford Strond for certain declarations relating to the matter of construction of the Pilotage Act 1913. Subsequently two summons based on information laid by one Sydney Rawlings Smith, the Principal of the Pilotage Department of Trinity House were issued out of the Thames Metropolitan Magistrates' Court against one J Watson a licensed waterman in the employment of the plaintiff company alleging offences against ss. 11 and 43 of the Pilotage Act 1913 respectively. Thereafter by a notice of motion the plaintiff company asked *inter alia* for orders restraining the defendants from proceeding against Watson on the two summonses until the final determination of the matter of construction raised by the originating summons. In allowing the motion to stay the proceeding before the Magistrates' Court, Buckley J said:

> *Jurisdiction of that kind, in my judgment, is very clearly a jurisdiction which must be exercised with the greatest care; and this Court would be very slow to interfere with the course of criminal proceedings unless it was clear that the issues in the civil proceedings and the criminal proceedings really raised in substance the same issue and that if the civil proceedings succeeded the criminal proceedings must necessarily fail.* In principal the Court discourages multiplicity of litigation in any form. In other words, the Court must be satisfied that to allow the criminal proceedings to be proceeded with pending the decision of the civil proceedings would really be vexatious. (*ibid* p. 204) (Emphasis is mine).

It is clear that in considering the case Buckley J was of the view that the criminal proceeding instituted in the Magistrate's Court based on information laid by the servant and agent of the defendant was vexatious and an abuse of the proceeding of the Court since the same issue had already been raised by the plaintiff in the civil proceeding in the High Court. At any rate a note of caution was given by the learned Judge as regards to the Court staying a pending proceeding in another Court when he said:

> As I understand it, the principle is that if two Courts are faced substantially with the same

question, it is desirable to ensure that that question is debated in only one of those two Courts **if by that means justice can be done**. (*ibid* p. 207) (Emphasis is mine).

Then again Buckley J said:

> Mr. Naisby says that the principle is that a man should not pursue a remedy in respect of the same matter in more than one Court. In my judgment, the principle is rather wider than that. I think it is that no man should be allowed to institute proceedings in any Court if the circumstances are such that to do so would really be vexatious. In my judgment, it is vexatious if somebody institutes proceedings to obtain relief in respect of a particular subject-matter where exactly the same issue is raised by his opponent in proceedings already instituted in another Court in which he is not the plaintiff but the defendant. (*ibid* p. 209) (Emphasis is mine).

The *Thames Launches* case is clearly distinguishable from the case before this Court. It cannot be gainsaid that the action instituted by the plaintiff here can by no means be said to be vexatious since in instituting the present action the plaintiff is merely exercising the statutory right conferred on it by the National Land Code. While in instituting the action in the commercial division the plaintiff is exercising the common law right to recover a debt due under a contract.

The situation in the *Royal Bank of Scotland Ltd. v. Citrusdal Investments Ltd.* [1971] 3 All ER 558 is the same as that in the *Thomas Launches* case. In allowing the plaintiff's originating summons to be stayed Plowman J applied the principles enunciated by Buckley J. Thus the *Royal Bank of Scotland Ltd.* case likewise does not support the suggestion that where matters involving substantially the same issues were raised in two different Courts it must follow that they should be debated in only one of those two Courts.

I shall now turn to the only issue raised in the present action namely whether the plaintiff bank can lawfully carry on banking business and if not whether the loan granted to the borrower secured by the charge on the said land is not void *ab initio*. In considering this issue the first point to be noted that it is misleading for the plaintiff to call itself the Co-operative Central Bank Ltd.; it is not a bank at all as it does not carry on banking business with members of the general public. The plaintiff was established under s. 7 of the Co-operative Societies Act 1948 (the 1948 Act). Under s. 30(1) of the 1948 Act a registered co-operative society is allowed to grant loans to its members. Pursuant to that section the plaintiff in the present case made loans to its members from time to time. It is however contended by the Counsel for the defendant that the granting of a loan could not amount to granting overdraft facilities. Now the granting of a loan may take various forms such as the advancing loans for the purchase of a house, land, or for purposes of establishing or the operation of a business enterprise. The word 'loan' is not defined in the 1948 Act. But upon a careful scrutiny of the 1948 Act, the object of setting up co-operative societies is to enable such societies to carry on all necessary transactions that will be beneficial to their members where such transactions can yield profits to be given out as dividends to the members (see s. 34(2) of the 1948 Act). Such transactions must surely include the granting of overdraft facility which is only one of the methods of making loans to its members. It is then said that even if the plaintiff can give loans to its members it cannot secure the loan by a charge on the said land. Let us again take a look at the 1948 Act. Under s. 30(3) of the said Act it is provided that:

> The minister may, by general or special order, prohibit or restrict the lending of money on a mortgage or charge of any description of immovable property by any registered society or class of registered societies.

The subsection clearly implies that registered co-operative society can accept a charge over

any land as security for the loan unless the Minister otherwise prohibits it from doing so. I have not been advised and I have not seen any such prohibitive order made by the Minister. It is therefore my considered opinion that the plaintiff is allowed under the 1948 Act to take a charge of the said land as security for the loan given to the borrower. In any case no corporation would give a loan without some form of security and the security can take the form of a guarantee or a charge over the borrower's land or a third party's land. To construe the provision of the 1948 Act in a restrictive sense would defeat the real intention of the legislature. In *Shannon Realties v. (Ville de) St. Michel* [1924] AC 185 Lord Shaw said at p. 192:

> Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.

Another point worthy of notice is that in enacting the Banking Act 1973, the legislature must have known that co-operative societies registered under the 1948 Act were allowed to give loans to their members. The fact that they did not think it necessary to exempt these societies from the provisions of the said Act pursuant to s. 59 thereof clearly indicates that the limited banking business carried out by these societies does not fall within the provisions of the said Act. It is important to note that the persons and bodies of persons exempted from the provisions of the said Act are persons and bodies of persons who are carrying on some form of banking business with members of the general public.

Finally it was suggested by Counsel for the defendant that in using the word 'bank' to describe its business, the plaintiff has infringed s. 9 of the Banking Act 1973. That being so the charge entered between the plaintiff and the defendant is therefore void pursuant to s. 24 of the Contracts Act 1950. The relevant parts of s. 24 of the Act read as follows:

> ... the consideration or object of an agreement is lawful unless:
>
> (a) it is forbidden by a law
>
> (b) it is of such nature that, if permitted it would defeat any law
>
> (e) the Court regards it is immoral or opposed to public policy.

It is clear that the loan given to the borrower secured by the charge is permissible under s. 30 of the 1948 Act. The consideration or object of the charge agreement is not therefore forbidden by law. The infringement of s. 9 of the Banking Act 1973 does render the charge agreement to be a nullity. The plaintiff may be liable to a penalty imposed under subsection (2) of s. 9 of the Banking Act 1973 but I cannot see how the penalty imposed by the said Act can affect the charge agreement which the plaintiff is allowed to enter into under the 1948 Act.

As regards to the contention that the plaintiff has also infringed the provisions of the Moneylenders Ordinance 1951 the answer can be found in s. 2A(1) of that Ordinance which says that the said Ordinance shall not apply to co-operative societies registered under the 1948 Act.

For the reasons as stated above the application of the defendant to stay the present action is dismissed. On the other hand I grant an order in the terms of the plaintiff's application made under this originating summons. The defendant is to pay the costs of this proceeding to the plaintiff.

Also found at [1991] 3 CLJ 2131